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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~767~~ 64

BREEDING MOTOR FREIGHT LINES, INC., DEBTOR,
Petitioner,

VERSUS

RECONSTRUCTION FINANCE CORPORATION; RALPH W. PORTER, Trustee of the Ernest W. Lyman Trust Estate, OPAL BOWLIN LYMAN; and TRI-STATE MOTOR TRANSPORT, INC., a corporation,
Respondents.

No. ~~768~~ 65

BREEDING MOTOR COACHES, INC., DEBTOR,
Petitioner,

VERSUS

RECONSTRUCTION FINANCE CORPORATION; RALPH W. PORTER, Trustee of the Ernest W. Lyman Trust Estate, OPAL BOWLIN LYMAN; and TRI-STATE MOTOR TRANSPORT, INC., a corporation,
Respondents.

No. ~~769~~ 66

GLENN E. BREEDING AND IRENE BREEDING, doing business as Breeding Motor Coaches and Breeding Motor Freight Lines, BREEDING MOTOR FREIGHT LINES, INC., and BREEDING MOTOR COACHES, INC.,
Petitioners,

VERSUS

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

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April, 1949.

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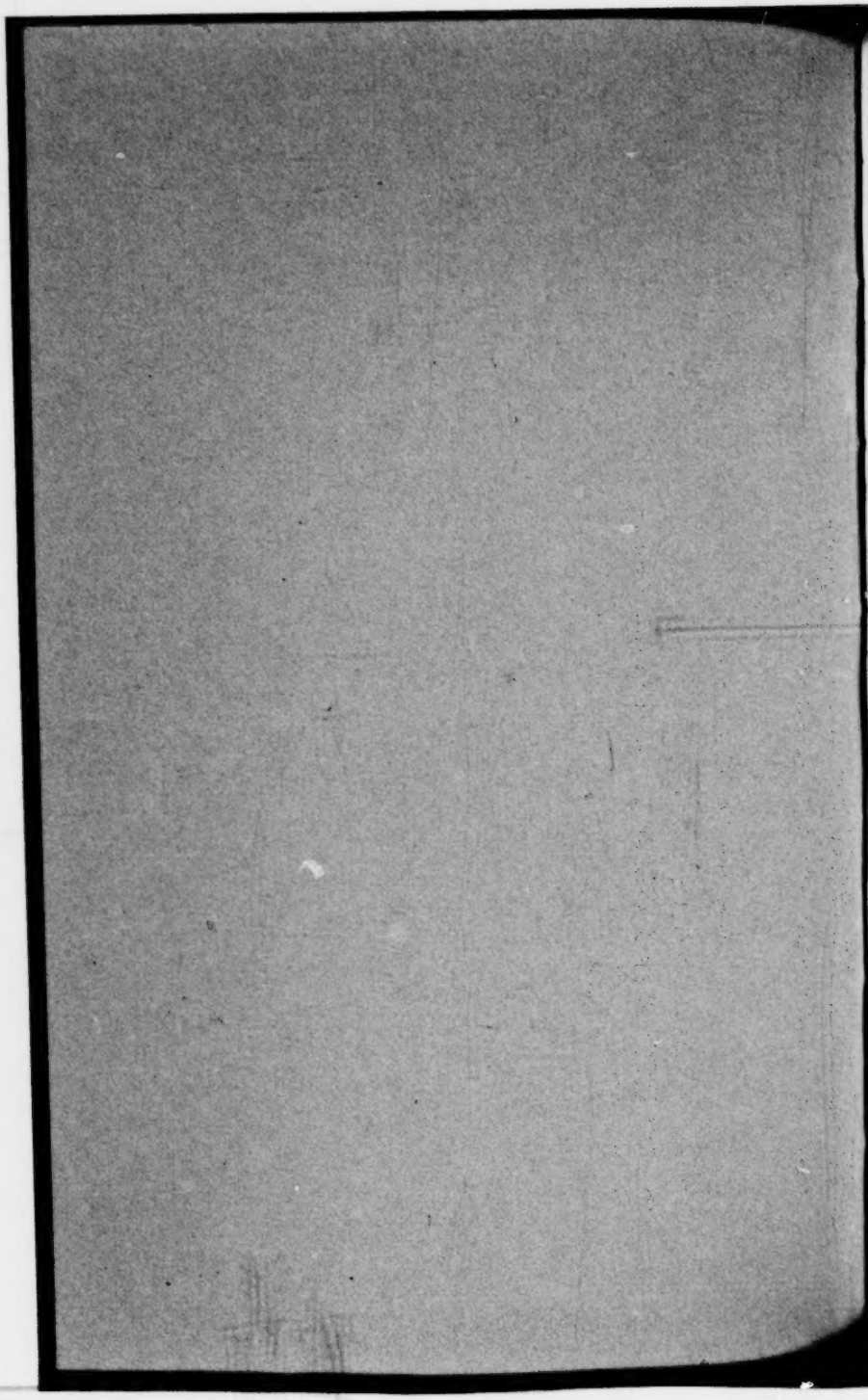

INDEX

SUBJECT INDEX

INDEX CONTINUED

INDEX CONTINUED

PAGE

AUTHORITIES

CASES:

INDEX CONTINUED

Supreme Court of the United States

(OCTOBER TERM, 1948).

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BREEDING MOTOR FREIGHT LINES, INC., DEBTOR,
Petitioner,

VERSUS

RECONSTRUCTION FINANCE CORPORATION; RALPH W. PORTER, Trustee of the Ernest W. Lyman Trust Estate, OPAL BOWLIN LYMAN; and TRI-STATE MOTOR TRANSPORT, INC., a corporation,
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PETITION FOR WRITS OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This petition covers and includes three docketed proceedings before this Court which were consolidated in the court below. They are closely related and have a common background. Two of the proceedings concern corporate reorganization under applicable statutes, and the other the validity of the sale of petitioners' assets subsequent to the dismissal of the reorganization proceedings. In presenting these matters, we will attempt to separate the salient features of each, and of necessity will refer to each proceeding by the docket number in the court below.

On June 25, 1945, Glenn E. Breeding and Irene Breeding, partners, d/b/a Breeding Motor Freight Lines and Breeding Motor Coaches, made a preliminary written application to the Reconstruction Finance Corporation, respondent herein, through The Liberty National Bank of Oklahoma City, Oklahoma, for a loan of $600,000.00 (R. 306 and 613-634). On August 17, 1945, this application was amended by a letter of that date, reducing the amount applied for to $560,000.00 (R. 306 and 635-638). On September 26, 1945, respondent, by appropriate resolution or commitment, approved the application for the $560,000.00 loan (R. 641-644). On November 9, 1945, petitioners executed and delivered to The Liberty National Bank of Oklahoma City, Oklahoma, their note in the principal sum of $560,000.00, and secured the same by two real estate mortgages, two deeds of trust, and a chattel mortgage (R. 7-44). On November 23, 1945, The Liberty National Bank

and respondent entered into a participation agreement with reference to said approved loan (R. 44-50).

At the time of the original application for said loan, petitioners, the partnership, were indebted to The Liberty National Bank and other banks in the total sum of $177,-125.05 (R. 615). The Companies at that time were operating at a loss of approximately $10,000.00 per month before depreciation, which was principally due to old, worn-out and defective equipment, and one of the main purposes of the loan was to secure additional equipment, in addition to retiring the then existing indebtedness to the banks and to provide sufficient working capital. At that time, also, the petitioners, the partnership, were indebted to Tri-State Motor Transport, Inc., and Ralph W. Porter, Trustee of the Ernest W. Lyman Trust Estate, by virtue of prior executed notes and mortgages upon the stock and assets of the partnership.

From the date of the original application to the respondent, the petitioners continued to operate at approximately the same loss each month. The first advancement on the loan was made during November, 1945, in the principal sum of $298.055.42, and at the time of this original advancement the loss was continuing, and in addition thereto petitioners' operations were shut down by virtue of a general strike throughout the territory.

The balance to be advanced petitioners was $261,-944.58.

Prior to February 1, 1946, the date respondent, Reconstruction Finance Corporation, commenced an action

in the trial court to recover the amount then asserted to be due and for foreclosure of mortgage liens, petitioners had paid upon said loan the sum of $21,784.00, leaving a balance of the said distributed sum of $276,271.42 (R. 52 and 54).

On February 1, 1946, respondent commenced an action in the trial court, being Cause No. 1793 Civil, to recover the amount then asserted to be due and for foreclosure of the mortgage lien in satisfaction thereof (R. 1-50). On March 4, 1946, petitioners, the partnership, filed their answer and counter-claim in which, among other things, they denied the asserted default, pleaded the amount advanced and the amount unadvanced, and sought to recover the amount due, $261,944.58; and by way of counter-claim sought to recover damages of $150,000.00 for failure of respondent to advance the full amount of the loan in accordance with its previous commitment (R. 51-54).

On this same date, petitioners, the partnership, filed original petitions In Proceedings for an Agreement under Chapter XI of the Chandler Act, 11 USCA, Section 701 *et seq.* (R. 304 and 788-796). The trial court at first approved the petitions, but required the execution of a surety bond, the terms of which could not be met, resulting in the dismissal of these proceedings on March 21, 1946 (R. 797).

On March 20, 1946, Tri-State Motor Transport, Inc., intervened in Cause No. 1793 Civil, and sought to recover the amount due on its note and for the foreclosure of certain chattel mortgages and deeds of trust which had been given therefor (R. 54-79), asserting the amount then due to be $77,149.50 plus attorney fees (R. 56). These mort-

gages and deeds of trust were superior to the lien of Reconstruction Finance Corporation on certain properties, but it had a second mortgage on all property covered thereby.

On April 12, 1946, the Lyman Estate filed a cross claim against petitioners, the partnership, seeking foreclosure upon unpaid notes and for the foreclosure of chattel and real estate mortgages, asserting the amount due on the notes to be $48,000.00 (R. 79-101), which was also superior in some instances to respondents' mortgages.

On April 15, 1946, a judgment and decree was entered in Cause No. 1793 Civil (R. 154-190). Judgment was rendered in favor of Reconstruction Finance Corporation in the amount of $253,577.52 plus interest and attorney fees of $10,000.00 (R. 155); judgment for the Tri-State in the amount of $77,720.32 with interest and costs plus an attorney fee of $3,500.00; and judgment in favor of the Lyman Estate in the sum of $48,000.00 with interest and attorney fees of $2,000.00 (R. 157).

The judgment and decree as between the petitioners and Reconstruction Finance Corporation was, in effect, an agreed judgment, in connection with which petitioners dismissed with prejudice their counter-claim, and the effectiveness of the decree was stayed for a period of sixty days with the right to further stays, which were granted. On September 20, 1946, a supplemental judgment and decree was made and entered in said cause in favor of the respondent and against the petitioners for the sum of $42,250.00 (R. 190-192). On May 2, 1947, Breeding Motor Freight Lines, Inc., appellant in Cause No. 3546, and

Breeding Motor Coaches, Inc., appellant in Cause No. 3547, were made parties defendant in said Cause No. 1793 Civil, and on that day the United States, by leave of court, filed a supplement and amendment to its intervening petition, wherein it asserted a tax claim totalling $101,492.86 (R. 192-195). On said date, J. T. Buckner was appointed Special Master (R. 190).

On May 8, 1947, an execution and order of sale was issued, directed to said Special Master (R. 199-203). On June 27, 1947, said Master made his return on said order of sale showing that he had not proceeded thereunder and requesting the issuance of an alias execution and order of sale (R. 199). On said day, June 27, 1947, an alias execution and order of sale was issued (R. 203-207). This order of sale shows that there was then due: (a) On the Tri-State judgment $7,612.15, with interest from May 2, 1947, plus an attorney fee of $3,500.00; (b) on the Lyman Estate judgment $40,711.90, with interest thereon from May 7, 1947, plus an attorney fee of $2,000.00; and (c) on respondent's judgments $243,368.51, with interest; or a total of $291,692.56 on all of the judgments, exclusive of interest and attorney fees.

On April 15, 1946, there was a total due on the three judgments rendered therein, exclusive of interest and attorney fees, the sum of $379,297.84. On September 20, 1946, a further judgment was rendered in favor of the respondent for $42,250.00 which, added to the last above mentioned total, makes a grand total of $421,547.84. On June 27, 1947, the date of the alias execution and order of sale,

there was due upon the judgments referred to therein, exclusive of interest and attorney fees, a total of $291,-692.56, a reduction of $129,855.28.

One of the deed of trust liens of Tri-State covered and included the St. Louis Terminal and the real estate upon which the same was located, and the other included the Joplin Terminal and the real estate upon which the same was located (R. 69-79). Between the judgment of April 15, 1946, and the date of the alias execution and order of sale of June 27, 1947, and in May, 1946, petitioners sold their St. Louis Terminal and the real estate upon which the same was located and other real estate used in connection therewith to Best Motor Lines for the sum of $62,500.00, which sum was applied upon the judgment lien of Tri-State, and this sum accounts for a portion of said reduction. This sale was approved by the court with the consent and approval of all of the parties to the action. The application of the proceeds of this sale reduced the Tri-State judgment to $7,612.15, exclusive of interest and attorney fees, and thereby increased the lien of respondent and left the Joplin Terminal, the value of which was more than sufficient to discharge the balance due Tri-State, including interest and attorney fees. In fact the record shows that the reasonable value of the Joplin Terminal was approximately $40,000.00. The remainder of the above stated difference was brought about as a result of the sale of equipment by agreement of the parties and/or by order of court. This record does not show the written contract of the sale of the St. Louis Terminal, but the facts and circumstances with reference thereto appear at page 325

of the record and respondents will agree we are sure that the facts and circumstances as herein and therein set forth with reference to the sale of said property are true.

The debtor appellant in No. 3546 in the court below was chartered as a Delaware corporation on or about November 21, 1945. It commenced doing business as such on July 1, 1946 (R. 322). On July 1, 1946, for a valuable consideration, the petitioners, the partnershp, sold, transferred and assigned to it, all of their properties and assets of every kind and character as applied to Breeding Motor Freight Lines. On said date, July 1, 1946, petitioners, the partnership, for a valuable consideration, sold, transferred, conveyed and assigned all of their properties and assets of every kind and character as applied to Breeding Motor Coaches to the appellant in Cause No. 3547. These respective sales were approved by the Interstate Commerce Commission and the various State regulatory bodies; and thereupon (1) all of their certificates of public convenience and necessity, State and Federal, as applied to the motor freight business were cancelled and new certificates issued in the name of the corporation appellant in said Cause No. 3546, and (2) all of their certificates of public convenience and necessity, State and Federal, as applied to the passenger and/or bus operations were cancelled and new certificates issued in the name of the appellant corporation in Cause No. 3547 (R. 324-325). Respondent, Tri-State and the Lyman Estate all knew and had actual knowledge of the cancellation of said certificates and the issuing of new certificates in lieu thereof.

On August 26, 1946, petitioners, the partnership, and appellant in No. 3547 entered into a written contract with

Crown Coach Company, a corporation, of Joplin, Missouri, by the terms of which they sold to that concern certain certificates of public convenience and necessity, State and Federal, for the sum of $150,000.00 (R. 682-688). In connection with this contract an escrow agreement was made and entered into between the parties thereto with The Liberty National Bank of Oklahoma City, Oklahoma, as the escrow holder (R. 688-691). The $50,000.00 cash payment referred to in said contract was placed in escrow with said bank along with a copy of the contract. This contract had not been consummated on June 27, 1947, the date of said alias execution and order of sale. This contract was approved by respondent alone, since it had the sole mortgage lien thereon.

On March 27, 1947, the appellant in No. 3546 entered into a written contract with Lee Way Motor Freight Lines, Inc., by which it sold to that concern certain motor freight operating rights, State and Federal, for $55,000.00, payable as therein provided (R. 670-674). $5,500.00 of the agreed purchase price, simultaneously with the execution of said contract, was deposited in the Commercial National Bank of Muskogee, Oklahoma, in escrow. The escrow agreement appears in the record at pages 677 to 679. This contract was approved by the respondent (R. 679-681).

In connection with the alias execution and order of sale of June 27, 1947, aforesaid, said Special Master published a notice of the sale of the properties therein described, dated July 15, 1947, wherein he fixed the sale date as of August 18, 1947 (R. 221-237).

On August 6, 1947, the appellants filed a motion to quash and withdraw the Special Master's said notice of sale and direct him to give and publish a new and corrected notice of sale (R. 207-219). On August 11, 1947, said motion was overruled (R. 219). On August 19, 1947, said Special Master filed his return on said alias execution and order of sale (R. 219-261). On August 21, 1947, the appellee filed a motion to confirm said sale as reported by the Special Master (R. 261-262).

On September 8, 1947, the appellants filed an objection to confirmation of said sale (R. 262-272). On September 9, 1947, they filed a correction to their objection to confirmation of sale (R. 272-274), and on that date an order was made and entered confirming said sale (R. 272-278).

A stenographic record was made of the Master's proceedings as to the sale of the properties advertised, which transcript appears in the record at pages 237 to 261. According to this transcript and the Master's return of sale he offered for sale said properties in portions or segments and then as a whole. The respondent became the purchaser of all of the properties sold, of every kind and character, for the sum of $145,000.00 (R. 261). Prior to August 21, 1947, the date the respondent filed its motion to confirm said sale, it acquired the judgment lien of the Lyman Estate and also the judgment lien of Tri-State (R. 261). The record does not show the exact date respondent acquired these judgments but we understand that it acquired them prior to said sale date of August 18, 1947. Be this as it may, it had eliminated them prior to the filing of its motion.

Prior to said sale date, and on May 29, and 31, 1947, respectively, the reorganization proceedings involved in Nos. 3546 and 3547 in the court below were commenced in the trial court, being Nos. 8012 and 8013 therein. On June 6, 1947, an appraisal was made of all of the properties involved in No. 3546 (R. 645-649). On the same day an appraisal was made of all of the properties involved in No. 3547 (R. 653-654). The total value of the freight rolling equipment of the appellant in No. 3546, as of June 6, 1947, was $155,900.00 (R. 645-646). The total value of the real estate terminals was $81,000.00. The total value of the furniture and fixtures and shop and dock equipment was $20,000.00 (R. 646). The total value of the operating rights exclusive of that involved in the Lee Way Motor Freight Lines, Inc., contract hereinbefore referred to, was $416,-000.00, and by adding these rights the total value of its operating permits was $471,000.00 (R. 647-649). The total value of all of the properties of every kind and character as reflected by said appraisal is $727,900.00 (R. 649).

The total value of the rolling equipment, office furniture, fixtures and shop equipment of the appellant in No. 3547, as of June 6, 1947, was $65,200.00 (R. 653). The total value of its operating rights, State and Federal, was $175,-000.00. Its total assets as of that date were $240,250.00 (R. 653-654).

The grand total, including the Lee Way operating rights, is $968,150.00.

The operating rights involved in the Lee Way Motor Freight Lines, Inc., contract were not sold at said sale, but all of the other properties, equipment, real estate and

operating rights, State and Federal, contained in the aforesaid appraisals of June 6, 1947, were sold for $145,000.00. The evidence as to the value of the properties referred to in each of said appraisals is practically undisputed, which evidence was introduced in connection with petitioners' objection to the confirmation of said sale.

II.

DECISIONS BELOW

The trial court did not file a formal opinion in connection with any of these matters. Its order dismissing the reorganization proceedings appears in the record at pages 459-460. The findings of fact and conclusions of law and order overruling objections to the sale and confirming the same appear at pages 274-278. The opinion of the Court of Appeals was filed February 7, 1949 (R. 871-885), reported in 172 Fed. (2d) (Advance Sheet No. 3, March 28, 1949) 416. Judgments were severally rendered on February 7, 1949.

III.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Section 1254 (1) and/or Section 2101 (c), Title 28, United States Code.

IV.

QUESTIONS PRESENTED

The following questions are presented:

A.

Reorganization Proceedings, Nos. 3546 and 3547 Court Below

(1) Did the original complaint in reorganization of petitioner, Breeding Motor Freight Lines (No. 3546 court below), state a cause of action for the relief sought, and thus did the court below err in affirming the action of the trial court in failing to appoint a temporary trustee and comply with the applicable statutory requirements, and in dismissing the proceedings as not filed in good faith?

(2) Did the undisputed evidence (in Cause No. 3546 court below) disclose circumstances warranting the exercise of the court's power to grant the petition and proceed with the reorganization, including the appointment of a temporary trustee, and submission of a plan of reorganization after notice to all creditors?

(3) Did the original complaint in reorganization of petitioner, Breeding Motor Coaches (No. 3547 court below) state a cause of action for the relief sought, and thus did the court below err in affirming the action of the trial court in failing to appoint a temporary trustee and comply with the applicable statutory requirements, and in dismissing the proceedings as not filed in good faith?

(4) Did the undisputed evidence (in Cause No. 3547 court below) disclose circumstances warranting the exercise of the court's power to grant the petition and proceed with the reorganization, including the appointment of a temporary trustee, and submission of a plan of reorganization after notice to all creditors?

B.

Foreclosure Sale

(1) Was the notice of sale sufficiently defective in one or more of the grounds stated in the objections to warrant setting aside the sale?

(2) Was the notice of sale defective in failing to advise prospective purchasers that the operating rights would be sold subject to approval of the Interstate Commerce Commission?

(3) Was the notice of sale defective in failing to advise prospective purchasers that the routes offered carried the right to serve intermediate and off-route points and area operations around and adjacent to principal cities on and along the routes?

(4) Was the notice defective in its failure to include certain valuable operating rights, and thus to advise prospective purchasers that the same were for sale?

(5) Did the court below err in refusing to set aside the sale because of the admitted departure from the judgment in the manner and requirement of a deposit by a bidder on any of the property?

(6) Did the court below err in affirming the action of the trial court in confirming the Special Master's manner and method of offering the personal property?

(7) Was it a prerequisite to setting the sale aside that petitioners make an affirmative showing of prejudice?

(8) Was the sale price so grossly inadequate, when coupled with the admitted irregularities, that the court

below erred in sustaining the sale; and was it a condition precedent that a showing of prejudice as to price and irregularities be made?

(9) If an affirmative showing of prejudice was required, was not the undisputed proof, coupled with circumstances apparent from the record, sufficient to show material prejudice to these petitioners?

V.

REASONS RELIED UPON FOR ALLOWANCE OF WRITS

A.

Reorganization Proceedings

The provisions of the Chandler Act (11 USCA, Secs. 501-676), as construed by applicable decisions of this Court, enjoin courts to encourage the free use of reorganization to prevent premature liquidation, and at least inferentially, enjoin them to indulge every effort to preserve business by complying with the statutes in closely investigating a given situation to see if a feasible plan for the preservation of the business can be carried out. The Court of Appeals has sanctioned the dismissal of good faith petitions which clearly stated causes of action. Furthermore, the undisputed evidence discloses that feasible plans could have been provided and carried out, had the opportunity been given. The Court of Appeals has, as we view it, departed from and sanctioned the trial court's departure from

the accepted and usual course of judicial proceedings in reorganization matters sufficiently to warrant the exercise of this Court's power of supervision.

B.

Foreclosure Sale

(1) The law applicable to notice and other proceedings relating to judicial sales under the provisions of 28 USCA, Secs. 847-849 (now Secs. 2001 and 2002-2004, is directly involved, and the court below has rendered a decision on important features of Federal law relating thereto which has not been and should be settled by this Court.

(2) The decision of the court below, requiring an affirmative showing of prejudice as a condition precedent to setting aside the sale on any ground, conflicts in our judgment with the decision of the Court of Appeals of the Eighth Circuit in *Bovay* v. *Townsend*, 78 Fed. (2d) 343. This Court, in the exercise of its jurisdiction, should settle such conflict.

(3) The decision of the court below in requiring an affirmative showing of prejudice as a condition precedent to setting the sale aside for any ground or reason, has decided a question relating to the Federal statute on judicial sales in a way probably in conflict with the applicable decisions of this Court.

(4) The court below has, in our judgment, departed from the accepted and usual course of judicial proceedings

and has sanctioned such a departure by the trial court on questions relating to judicial sales so as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that these petitions for writs of certiorari to review the judgments of the Court of Appeals for the Tenth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITIONS

OPINIONS

The trial court did not file any opinion in either of these matters. The opinion of the Court of Appeals was filed February 7, 1949, and officially reported in 172 Fed. (2d) (Advance Sheet No. 3, March 28, 1949) 416. No petitions for rehearing were filed.

JURISDICTION

Petitioners seek review by certiorari of the judgments of the United States Court of Appeals for the Tenth Circuit of February 7, 1949, under the provisions of Sec. 1254(1) and/or Sec. 2101(c), Title 28, United States Code.

STATEMENT OF THE CASE

The "summary statement of the matters involved" in the petitions, the petition or complaint in each of the reorganization cases (R. 321-394; 395-457), and the objections to the confirmation of the sale (R. 262-274), present a fairly accurate statement, and petitioners adopt them as such.

SPECIFICATIONS OF ERROR

A.

Reorganization Proceedings

(1) The Court of Appeals erred in concluding that the trial court did not abuse its discretion in dismissing both of said cases.

(2) The Court of Appeals erred in holding that the petition in each of the reorganization cases did not state a cause of action for the relief sought.

(3) The Court of Appeals erred in holding that the undisputed evidence did not sustain the essential features of a good faith reorganization.

(4) The Court of Appeals erred in affirming the dismissal of either one or both of said proceedings.

B.

Foreclosure Sale

(1) The Court of Appeals erred in holding that an affirmative showing of prejudice was required as a condition precedent to setting the sale aside.

(2) The Court of Appeals erred under all the circumstances in upholding the validity of the sale.

(3) The Court of Appeals erred in holding that the failure to advertise the operating permits of petitioners as being sold subject to the approval of the Interstate Commerce Commission was not a defect sufficient to warrant setting aside the sale.

(4) The Court of Appeals erred in holding that the failure to describe or include valuable operating rights in the notice of sale was not sufficient to warrant setting aside the sale.

(5) The Court of Appeals erred in holding that the departure of the Special Master from the decree or order

of sale was not sufficient to warrant setting aside the sale without an affirmative showing of prejudice.

(6) The Court of Appeals erred in holding that the notice of sale was not defective and misleading.

(7) The Court of Appeals erred in holding that the Special Master did not abuse his discretion in the manner in which he offered the personal property of petitioners for sale.

(8) The Court of Appeals erred in holding that the price obtained at the sale was not unconscionably low.

(9) The Court of Appeals erred in holding that the insufficient price, coupled with irregularities and defects, was not sufficient to warrant setting aside the sale.

SUMMARY OF THE ARGUMENT

A.

Reorganization Proceedings

Point I.

The petition in each of the reorganization proceedings stated a cause of action for the relief therein sought, and the uncontradicted evidence sustained the essential features thereof. The court below erred in affirming the dismissal of each of said actions for lack of good faith.

Point II.

The record shows that after dismissal of the reorganization proceedings, all of the property and assets of

petitioners, except one operating right theretofore sold, were sold at public sale and purchased by respondent. This fact does not make the questions involved moot, and this Court has a right to determine the questions notwithstanding such sale.

B.

Foreclosure Sale

Point I.

The court erred under all the circumstances and as a matter of law in confirming the sale because: (a) the notice of sale was defective and misleading; and (b) the sale was conducted in a manner different from that directed by the alias order of sale.

Point II.

The manner in which petitioners' personal property was offered at the sale constituted a clear abuse of discretion.

Point III.

The court erred in holding that the price obtained was adequate, even when considered with the defective notice of the sale and other circumstances.

Point IV.

The court erred in requiring an affirmative showing of prejudice to petitioners before allowing the sale to be set aside because of any defects or irregularities, or inadequate price.

ARGUMENT

A.

Reorganization Proceedings

Point I.

The petition in each of the reorganization proceedings stated a cause of action for the relief therein sought, and the uncontradicted evidence sustained the essential features thereof. The court below erred in affirming the dismissal of each of said actions for lack of good faith.

It is settled by this Court that reorganization proceedings are to be favored, rather than condemned. *Claridge Apartments Company* v. *Commissioner of Internal Revenue*, 323 U. S. 141, 89 L. Ed. 139. And we believe that the court should indulge a favorable presumption upon the filing of a proper petition, and closely scrutinize the circumstances to see if it is at all possible to circumvent a premature liquidation. The underlying purpose, as we understand it, of a corporate reorganization proceeding is a ratable distribution of assets among all classes of stockholders as well as creditors. *Young* v. *Higbee Company*, 324 U. S. 204, 89 L. Ed. 890. And the rule is well-settled, as we understand it, that in such a proceeding the court undertakes through its trustee or otherwise to preserve and hold intact the corporate assets, rehabilitate it and put it upon a paying basis, so that its creditors, secured and unsecured, stockholders of various classes and all persons interested may be protected. We believe the petitions under review, as well as the circumstances disclosed by the evidence, indicate situations which should have justified the court in assuming jurisdiction and appointing a temporary trustee as provided for by statute.

In determining whether to rehabilitate a corporation, the courts, as we understand it, give appropriate consideration to the future earning power and possibilities of the debtor. *Consolidated Rock Products Company* v. *Du Bois,* 312 U. S. 510, 85 L. Ed. 982; *Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Company,* 318 U. S. 523, 87 L. Ed. 960.

In this connection the evidence, as well as the petitions, disclosed the feasible creation of a streamlined operation between important termini which would clearly have given sufficient earnings, with new equipment, to retire all obligations within a reasonable time. Furthermore, the evidence showed that in the creation of this so-called streamlined operation good faith sales could have been conducted of valuable but unnecessary operating permits and of valuable real estate which would have materially reduced respondents' judgment indebtedness or practically have eliminated it, and still leave it amply secured. Respondents' and the other creditors' obligations could have been retired in due course without the necessity of liquidation of petitioners' assets.

We also understand the rule to be that great consideration is and should be given to the reasonable value of corporate assets in excess of secured liens in determining the feasibility of any reorganization plan. In this, these proceedings presented circumstances, by practically undisputed evidence, of considerable assets over and above all secured liens.

As above stated, the proof showed total assets of the petitioner, Breeding Motor Freight Lines, Inc., Cause No.

3546 court below, of $727,900.00; and of the petitioner, Breeding Motor Coaches, Inc., Cause No. 3547 court below, of $240,250.00, or a total valuation, including the Lee Way operating rights under contract of sale, of $968,150.00. As against this, the judgment indebtedness secured by mortgage liens, was $291,692.56 at the time the reorganization proceedings were commenced. Additionally, there were tax claims in excess of $100,000.00, but the proof showed that good faith compromises were in the course of being perfected. The record also shows the various sales which were in the process of consummation, from which respondents' judgment indebtedness would have been further reduced or practically eliminated.

We sincerely believe that this evidence, under the excess assets rule, was clearly sufficient to warrant the court in assuming jurisdiction and at least in the appointment of a temporary trustee.

One ground upon which the court below apparently affirmed was evidence of the loss in operations which had continued. This is of course true. But it must be remembered that this loss was going on at the time of the original application for the loan and continued until approval of the loan and thereafter. The primary cause of this loss was the old, worn-out equipment which was expensive to operate, and one of the primary purposes of the original loan was to secure new equipment to overcome this monthly operating loss. At least it was incumbent upon the trial court to appoint a temporary trustee to see if a feasible plan for purchase of new equipment could have been consummated, and whether such a plan would have put the

operations on a paying basis. This discretion was abused in not doing this.

The tax situation of petitioners is another ground upon which the court below apparently affirmed, but the evidence of good faith compromises in this respect was apparently ignored. Furthermore it is clear that the trial court had the power and authority to deal with these tax liens and to approve any settlement or compromise thereof. *New York* v. *Irving Trust Company*, 288 U. S. 329, 77 L. Ed. 815; *Gardner* v. *New Jersey*, 329 U. S. 565, 91 L. Ed. 504. At least the court should have taken jurisdiction and determined, in conjunction with a temporary trustee, the possibility and feasibility of retiring and compromising these liens.

Respondents took the position in the trial court, and lower court that the mortgage lien creditors had the veto power of any reorganization plans which might be presented. Section 603 of the Act deals with a situation like this, and we believe that the court was well warranted under all of the circumstances in disregarding or disqualifying these mortgage lien creditors in considering a proposed plan. *Young* v. *Higbee Company*, *supra*.

We sincerely believe that the petitions and undisputed evidence present facts and circumstances warranting the assumption of jurisdiction, at least temporarily, to determine the feasibility of the then plan and ideas of petitioners or for consideration of whether any other feasible plan could have been successfully presented and carried out within the declared liberal purposes of the Chandler Act. Failure to do this and the affirmance thereof by the

court below were in our judgment harsh, unliberal and an abuse of discretion which should move this Court to assume jurisdiction of these proceedings for appropriate consideration.

Point II.

The record shows that after dismissal of the reorganization proceedings, all of the property and assets of petitioners, except one operating right theretofore sold, were sold at public sale and purchased by respondent. This fact does not make the questions involved moot, and this Court has a right to determine the questions notwithstanding such sale.

On June 10, 1947, each of said reorganization proceedings was dismissed; and on June 13, 1947, notice of appeal was filed in each of them. The alias order of sale was issued on June 27, 1947, and the sale was held on August 18, 1947, at which sale the respondent, Reconstruction Finance Corporation, was the purchaser. On the date of the sale an appeal was pending in each of these proceedings, and by reason thereof, proceedings were pending notwithstanding such dismissals and the questions presented by the record in this case are not moot. *Mackenzie* v. *Engelhard & Sons Company,* 266 U. S. 131, 69 L. Ed. 205; *Wayne United Gas Company* v. *Owens-Illinois Glass Company,* 300 U. S. 131, 81 L. Ed. 557.

In due course the appeals were perfected, and in accordance with the cited decisions of this Court the matters are properly for consideration here.

WHEREFORE, it is respectfully submitted that this Honorable Court assume jurisdiction of these two proceedings, to supervise and take appropriate action in what we consider to be judgments contrary to the declared liberal purposes of the Chandler Act and abuse of discretion on the part of the court below in affirming.

B.

Foreclosure Sale

Point I.

The court erred under all the circumstances and as a matter of law in confirming the sale because: (A) The notice of sale was defective and misleading; and (B) the sale was conducted in a manner different from that directed by the Alias Order of Sale.

Properties having a fair valuation of $913,150.00 were sold at this judicial sale for $145,000.00, to respondent. The manner and method employed in advertising and conducting this sale, we feel, was largely responsible for this grossly inadequate price, to the clear detriment of these petitioners.

Notice of sale is given to secure bidders and prevent a sacrifice of the property, and while immaterial errors in the notice and description are not sufficient to warrant setting the sale aside, still if mistakes, omissions and discrepancies in such notice may reasonably be calculated to mislead and deter bidders and the property is sold at an inadequate price, the sale will and should be set aside.

Paragraphs 2, 3, 4, 6, 7, 9, 11, 12, 13, 15, 16, 26 and 27 of the motion to direct issuance of a new notice (R.

207-218) (incorporated into the objection to the confirmation of the sale by reference) reveal instances which were substantiated by undisputed proof where the notice did not correctly describe the operating permits of petitioners. Old cancelled permits were offered for sale, and we believe and respectfully submit that such a situation, which could have been readily corrected, had a material effect upon bidders and misled and deceived them, or could be reasonably calculated to deceive them.

No evidence or notice was given that substituted permits would be transferred, and prospective purchasers were only advised of this at the sale.

The notice of sale omits certain valuable operating rights of petitioners. This includes authority contained in the certificates to serve certain industrial areas surrounding St. Louis, Kansas City, Springfield, Joplin, Tulsa and Oklahoma City. It also includes the right to serve intermediate points on the various routes and certain off-route points. Such service is of vital importance to motor carriers, and makes a permit much more valuable. A prospective purchaser was not advised that these valuable rights were to be sold.

Additionally, the notice omitted valuable irregular route operating authority and valuable operating rights between Oklahoma and Arkansas and certain valuable rights in the State of Kansas. A prospective purchaser of any of these rights could not know that they were up for sale, and it is reasonable to conclude that prospective purchasers of these routes did not appear and bid. We believe this omission was seriously misleading, deceptive and deterred bidders.

The notice failed to advise prospective purchasers that the sale of any of the operating permits would be subject to the approval of the Interstate Commerce Commission, and so far as the motor carrier industry was concerned any prospective purchaser would necessarily conclude that any purchase he might make would be a gamble on his part, depending upon the subsequent action of the Interstate Commerce Commission in appropriate hearings wherein various matters affecting the transfer of permits are considered, such as financial ability, public interest and things of that nature. This was most certainly a glaring defect which was not cured until the sale when an announcement was made that the rights would be sold subject to approval. It is submitted that this defect was deceiving, misleading and deterred bidders.

The sale was conducted in a manner different from that directed by the alias order of sale. In said order the Special Master was instructed to obtain a deposit of $300.00 as a pledge of good faith of any bidder. This was ignored at the sale and prospective bidders were required to deposit one-tenth of any amount bid. In view of the way in which the property was offered *en masse,* rather than in small parcels, it is readily apparent that prospective bidders might not have been in position to meet this requirement. The court below concedes this to be an irregularity, but declines to upset the sale in the absence of an affirmative showing that petitioners were prejudiced by this one thing.

We believe and urge that the defects as shown by the record herein were material, calculated to deceive bidders,

and were sufficient to warrant the court below in setting aside the sale. In its failure to do this, we submit that the court below committed error.

Point II.

The manner in which petitioners' personal property was offered at the sale constituted a clear abuse of discretion.

The personal property of the freight and bus lines was offered in the following manner:

(1) All of the personal property of the freight operation, including trucks, passenger cars, dock and shop equipment, office equipment, parts and accessories, and all other tangible personal property.

(2) All of the Tri-State franchises (except those involved in the Lee Way sale).

(3) All of the Lyman freight operating permits, both inter and intra state.

(4) The bus equipment described in Schedule A of the notice.

(5) The bus franchises as a whole, including inter and intra state operations.

(6) The bus equipment and bus franchises.

(7) Some parts and accessories of Reeves Equipment Company.

(8) Property and assets as a whole.

The personal property of the freight operation, including trucks, trailers, tires, office desks, tables, chairs, filing cabinets, typewriters, dock and shop equipment, parts and

miscellaneous items, were offered *en masse*. While there is some discretion in the manner and method of offering personal property for sale, still it must be offered in a manner calculated to bring the best price, and the discretion can be abused and the sale set aside where it is offered in such a grossly unfair manner as to prevent the maximum price being obtained.

—*Revere Copper & Brass, Inc.*, v. *Adriance Machine Works, Inc.* (2nd Cir.), 68 Fed. (2d) 708;

Bovay v. *Townsend* (8th Cir.), 78 Fed. (2d) 343;

50 C. J. S., pp. 600, 604;

31 American Jurisprudence, "Judicial Sales," Sections 81, 82;

Reconstruction Finance Corporation v. *Kentucky River Coal Corporation* (6th Cir.), 114 Fed. (2d) 942;

Stockmeyer v. *Tobin*, 139 U. S. 176, 35 L. Ed. 123;

The Prewabic Mining Company v. *Mason*, 145 U. S. 349, 36 L. Ed. 732;

Albert T. Schroeder v. *John M. Young*, 161 U. S. 334, 40 L. Ed. 721.

It is apparent that the manner of offering here was fundamentally wrong. A prospective purchaser of office desks had to buy all of the desks to get what he wanted, and, what is more, had to purchase $155,000.00 worth of trucks, all of the trailers, chairs, filing cabinets and all other miscellaneous items of personal property. Of course this was an impossible situation.

Again, a purchaser of trucks, if he desired only five or six, had to purchase all of them, and, furthermore, all of the desks, cabinets and other items of personal property. An intolerable situation was created which was most certainly calculated to deter bidders and actually stifle all bids on this personal property except that of respondent. Respondent recognized this, for at the conclusion of the sale, a representative of the respondent announced (R. 301):

Q. "(By Mr. Dudley) Mr. Breeding, at the conclusion of this sale did you hear Mr. Perkins make any remarks?

A. Yes, sir.

Q. Who is he?

A. He is a representative of the Reconstruction Finance Corporation.

Q. What did Mr. Perkins state?

A. He stated the RFC realized there weren't many firms that wanted to buy or would buy the amount of property that was offered for sale but there were some who wanted to buy portions and the RFC would now sell it in small lots; if he was interested he might see him at the Severs Hotel or thereafter in Oklahoma City.

The Court: Was a record made of what he said?

Mr. Adams: No, there wasn't, your Honor. But that transpired. There isn't any question about that."

The sale of the personal property of the bus operation was similar, and the record shows almost a total lack of bidders on this property other than respondent. Further-

more, the offering of the operating permits was designed to deter prospective bidders of any parts or portions thereof. A prospective purchaser, in order to purchase a single segment, necessarily had to purchase many other permits covering both regular and irregular route operations, as well as oil field and other types of operations which could not have been carried on by such purchaser under the regulations of the Interstate Commerce Commission.

We respectfully submit that the court below abused its discretion and committed error in permitting this type of sale.

Point III.

The court erred in holding that the price obtained was adequate, even when considered with the defective notice of the sale and other circumstances.

The undisputed evidence showed a valuation of petitioners' property of $913.150.00. Respondent purchased this valuable property for $145,000.00, or approximately one-eighth of its reasonably fair value. The court below held that this price was not so inadequate as to warrant setting the sale aside. In this we believe the court below was in error, and particularly so when the defects and irregularities heretofore indicated were present, which undoubtedly resulted in the respondent being able to obtain the property at such a price.

While there is no specific rule that can be laid down for all cases, we believe that the facts and circumstances here clearly showed a grossly inadequate price sufficient

to shock the conscience of this Court, and that the sale should be set aside for that reason alone, and particularly where such a grossly inadequate price is coupled with other facts and circumstances indicating an improper sale.

This Court laid down the rule in *Albert T. Schroeder et al.* v. *John M. Young*, 161 U. S. 334, 40 L. Ed. 721, as follows:

> "While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; * * *; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price,—the sale may be set aside * * *."

We respectfully submit that the circumstances disclosed by the record herein indicate major considerations of unfairness, and we further submit that the price obtained at this sale was grossly inadequate and sufficient in itself to have warranted the court below in setting the sale aside. In these circumstances, we believe the judgment of the court below is contrary to the applicable decisions of this Court, and that this Court should assume jurisdiction herein for the purpose of investigating further into this sale proceeding.

Point IV.

The court erred in requiring an affirmative showing of prejudice to petitioners before allowing the sale to be set aside because of any defects or irregularities, or inadequate price.

The court below added a requirement of prejudice as a condition precedent to upsetting the sale and reversing the trial court. According to its judgment, a judicial sale may not be set aside without an affirmative showing that the particular defect or erroneous circumstance was prejudicial to the owner of the property. Apparently the court below would require a substantial showing by persons who might have bid on the property to the effect that they were misled by the notice or that the manner in which the sale was conducted prevented them from bidding at a price in excess of the bid price.

We believe this requirement is contrary to applicable decisions of this Court:

—*Julia C. Gelfert* v. *National City Bank of New York*, 313 U. S. 221, 85 L. Ed. 1299;

Prewabic Mining Company v. *Mason*, 145 U. S. 349, 36 L. Ed. 732;

E. G. Ballentyne v. *William O. Smith*, 205 U. S. 285, 51 L. Ed. 803;

Albert T. Schroeder et al. v. *John M. Young*, 161 U. S. 334, 40 L. Ed. 721, *supra*.

We also believe the decision of the court below to be in conflict with the decision of the Court of Appeals for the Eighth Circuit, in *Bovay* v. *Townsend*, 78 Fed. (2d) 343.

If so, it is respectfully submitted that this Court should assume jurisdiction herein to settle this apparent conflict upon an important question of Federal law.

If a showing of prejudice was an absolute requirement, we believe and earnestly submit that the record in this case adequately shows prejudice, not only in the defective and misleading notice of sale which was published, but also in the erroneous manner in which the property was offered to prospective purchasers, all of which resulted in a sale dominated and controlled by respondent in which a grossly inadequate price was obtained for the valuable properties.

Respectfully submitted,

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April, 1949.

No. ~~770~~ 67

Supreme Court of the United States

OCTOBER TERM, 1948

GLENN E. BREEDING and IRENE BREEDING, doing business as Breeding Motor Coaches and Breeding Motor Freight Lines; BREEDING MOTOR COACHES, INC., a corporation; and BREEDING MOTOR FREIGHT LINES, INC., a corporation,
Petitioners,

VERSUS

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

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May, 1949.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 3-8780

INDEX

PAGE

SUBJECT INDEX

INDEX CONTINUED

AUTHORITIES

CASES:

INDEX CONTINUED

No. .....

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GLENN E. BREEDING and IRENE BREEDING, doing business as Breeding Motor Coaches and Breeding Motor Freight Lines; BREEDING MOTOR COACHES, INC., a corporation; and BREEDING MOTOR FREIGHT LINES, INC., a corporation,
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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case is closely related to other docketed proceedings before this Court involving the same parties. It was consolidated with these other proceedings in the court below, which were Nos. 3546, 3547 and 3596 therein. The docket numbers in this Court are not available. This matter

involves the validity of the judgment rendered in favor of respondent upon the notes and mortgages sued upon. The validity of the judgment is challenged because the original note and mortgages did not receive the approval of the Interstate Commerce Commission prior to their issuance, as required by Sections 314 and 20(a), Title 49 USCA.

On November 9, 1945, and prior thereto, the petitioners, the partnership, did business as Breeding Motor Freight Lines and Breeding Motor Coaches, the former being a common carrier of commodities in interstate commerce, and the latter a common carrier of passengers in interstate commerce. Both of the lines operated subject to the jurisdiction of the Interstate Commerce Commission.

On the mentioned date, petitioners, the partnership, executed the note and mortgages sued upon (R. 7-44, Cause No. 3596). The respondent participated in this loan transaction, and passed a resolution in connection therewith (R. 641-644, Cause No. 3596), and entered into a participation agreement with The Liberty National Bank (R. 44-50, Cause No. 3596).

On or about February 1, 1946, respondent commenced the action in the trial court to obtain judgment on the note and to foreclose the mortgages (R. 1-50, No. 3596). Petitioners, the partnership, filed an answer and cross-petition (R. 51, No. 3596). A judgment was rendered on April 15, 1946 (R. 154, No. 3596). No Special Master was appointed to take over the properties and assets, and petitioners, the partnership, continued to operate the properties until July, 1946, at which time the properties and assets were transferred to the petitioners, the corporations,

with notice thereof to the respondent. A supplemental judgment was entered in favor of respondent on or about September 20, 1946 (R. 190, No. 3596).

In arranging for the loan from The Liberty National Bank to be participated in by the respondent, the petitioners, the partnership, was represented by a member of the law firm which generally represents The Liberty National Bank. It is undisputed and agreed that at no time prior to the execution of the note and mortgages did the respondent apply for or receive approval of the Interstate Commerce Commission. It is also agreed that the respondent had no notice that this had not been done, and was not aware of the provisions of the statute (R. 84).

The indebtedness of the petitioners, the partnership, on November 9, 1945, was either $606,319.77 (R. 92) or $606,320.07 (R. 96). There is some difference in the testimony concerning the application of this amount between the freight line and the bus line. Breeding testified that $519,342.99 applied to the freight operation, and $88,-976.78 applied to the passenger operation (R. 93).

Mr. Perkins, respondent's representative, testified that, disregarding obligations to Mr. Breeding and his related companies, the total indebtedness was $563,928.20, $124,-207.00 of which was allocated to the passenger operation, and approximately $420,000.00 applicable to the freight operation (R. 97-99).

Defendants' Exhibit 1 (R. 101) indicates the petitioners' indebtedness as of November 9, 1945, allocated to each of the operations. It is agreed that the principal amount of the note was $560,000.00.

Certain happenings after the entry of judgment are agreed (see stipulation, R. 76-84), and the record further reflects that the petitioners sought relief from the judgment (R. 205) pursuant to Rule 60, and release of collateral from the lien of the judgment (R. 506), all of which was denied by or never presented to the court.

Petitioners sold a portion of the operating rights to Lee Way Motor Freight Lines, in which sale they were subsequently joined by the Special Master pursuant to order of the court. On or about August 18, 1947, the Special Master sold the remaining assets at public sale, and the same was confirmed over the objection of defendants (Case No. 3596).

The respondent purchased all of the property and assets at the public sale, and thereafter sought approval of the Interstate Commerce Commission to transfer the operating rights and certain equipment to various persons with whom it had entered into contracts for the sale thereof. The Interstate Commerce Commission approved the transfers by order of May 25, 1948 (R. 18-75). However, respondent, the purchasers and the Interstate Commerce Commission were timely notified that petitioners contended that the judgments were void and no question of innocent purchaser can be involved. Purchasers all protected themselves by appropriate contractual provisions (R. 23).

The Court of Appeals seems to affirm the judgment on the ground that action by the Interstate Commerce Commission subsequent to the judgment had the effect of validating the original note and mortgages so as to make the judgment valid. The Court of Appeals, however, fur-

ther states that: "In view of all of the facts and circumstances, it cannot be said that the court erred in denying the motion to vacate the judgment on the ground of the invalidity of the note and mortgages for want of approval by the Commission in advance of their execution." This language in our judgment is broad enough to indicate an affirmance upon all of the grounds stated by the trial court. In view of this, we deem it necessary to present the other questions involved.

II.

DECISIONS BELOW

The trial court did not file a formal opinion, but its findings of fact and conclusions of law and judgment overruling the motion appear in the record at pages 85 to 89. The opinion of the Court of Appeals was filed February 7, 1949 (R. 109-123), and reported in 172 Fed. (2d), Advance Sheet No. 3, March 28, 1949, page 416.

III.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Section 1254 (1) and/or Section 2101 (c), Title 28, United States Code.

IV.

QUESTIONS PRESENTED

(1) The original note was for the principal sum of $560,000.00, and was secured by real estate and chattel mortgages. Neither the note nor mortgages were ever

presented to or approved by the Interstate Commerce Commission as required by the provisions of Section 314 and 20 (a), Title 49 USCA. In view of this, were not the original note and mortgages and the judgment in favor of respondent thereon void?

(2) Were the original note and mortgages securing the same, together with the judgment, validated by the subsequent action of Division 5 of the Interstate Commerce Commission in a collateral proceeding in approving the transfers of certain of petitioners' operating permits to purchasers from respondent following the foreclosure sale?

(3) Did the petitioners waive the invalidity of the note and mortgages and the judgment based thereon by a failure to raise the question of lack of approval of the Interstate Commerce Commission prior to the entry of judgment?

(4) Was the motion for relief from judgment filed within a reasonable time in accordance with Rule 60 (b) of the Federal Rules of Civil Procedure?

V.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The reasons upon which petitioners rely for allowance of the writ are as follows:

(1) The proper construction of the provisions of Sections 314 and 20 (a), Title 49 USCA, as applied to the motor carrier industry, is directly involved, and the Court of Appeals has decided an important question of Federal

law which in our judgment has not been but should be settled by this Court.

(2) There is or may be involved an important question concerning Rule 60 (b) of the Federal Rules of Civil Procedure as amended, as relates to the timely filing of motions for relief from void judgments under the provisions of said rule, which has not but should be settled by this Court.

(3) The trial court held that the invalidity of the note and mortgages and the judgment could not be raised after entry of judgment, which decision was probably affirmed by the Court of Appeals. In this the Court of Appeals has, in our judgment, so far departed from the accepted and usual rules relating to the vacation of judgments, or has sanctioned such a departure by the trial court, as to call for the exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION

DECISIONS BELOW

The trial court did not file a formal opinion, but its findings of fact and conclusions of law and judgment overruling the motion to vacate the judgment appear in the record at pages 85 to 89. The opinion of the Court of Appeals was filed February 7, 1949 (R. 109-123), and reported in 172 Fed. (2d) Advance Sheet No. 3, March 28, 1949, page 416. Petitioners did not file a petition for rehearing. The judgment of the Court of Appeals was entered on February 7, 1949 (R. 124).

JURISDICTION

Petitioners seek review by certiorari of the judgment of the United States Court of Appeals for the Tenth Circuit of February 7, 1949, under the provisions of Section 1254 (1) and/or Section 2101 (c), Title 28, United States Code.

STATEMENT OF THE CASE

The petitioners, the partnership, in 1945, while indebted in a sum in excess of $500,000.00, executed a note in the principal sum of $560,000.00, secured by real estate and chattel mortgages, to The Liberty National Bank of Oklahoma City, Oklahoma, which said note and mortgages were executed following the approval of the loan by respondent. The loan was made with respondent through The Liberty National Bank, and respondent participated therein. The note and mortgages were not submitted to or approved by the Interstate Commerce Commission as required by Sections 314 and 20 (a), Title 49 USCA. The

transaction was primarily handled by attorneys regularly representing The Liberty National Bank, and it appears that neither the petitioners nor the respondent was aware of the provisions of the above mentioned statute.

Later, an action was instituted by respondent upon the note and for foreclosure of the mortgages, and a judgment was rendered for the amount theretofore advanced and for foreclosure of the mortgages. Subsequently, respondent purchased at foreclosure sale all of the assets of petitioners, and thereafter entered into contracts with various carriers for the sale of some of the operating permits of petitioners. Applications were filed with the Interstate Commerce Commission for transfer of these permits. Petitioners then became aware of the failure to secure authorization for the original note and mortgages and raised the question before the Interstate Commerce Commission in connection with the transfer proceedings. The Interstate Commerce Commission declined to hear petitioners on this point, holding that it was a collateral attack upon the judgment of the Federal Court. The Interstate Commerce Commission did approve some of the transfers from respondent to other parties. Within a short time thereafter, petitioners moved to vacate the judgment under Rule 60 (b) of the Federal Rules of Civil Procedure, which motion was overruled by the trial court and sustained by the Court of Appeals.

SPECIFICATIONS OF ERROR

(1) The original note and mortgages and the judgment based thereon were void under the plain provisions of Sections 314 and 20 (a), Title 49 USCA, and the United

States Court of Appeals erred in holding that the action of the Interstate Commerce Commission subsequent to the judgment in affirming the transfer of certain of petitioners' permits amounted to an unmistakable recognition of the note and mortgages and thus constituted a ratification or validation of the note and mortgages and the judgment based thereon.

(2) The Court of Appeals erred in holding in effect that the mere knowledge of the existence of the note and mortgages in connection with the transfer proceedings before the Interstate Commerce Commission amounted to an approval of the note and mortgages, in order to give effect to the judgment.

(3) The Court of Appeals erred in holding that the note and mortgages were valid and the judgment based thereon was valid.,

(4) The Court of Appeals erred in affirming, if it did, the trial court's judgment in denying relief from the judgment because the question of the invalidity of the note and mortgages was not raised prior to entry of the judgment.

(5) The Court of Appeals erred in affirming, if it did, the judgment of the trial court that the motion to vacate the judgment was not filed within a reasonable time.

SUMMARY OF THE ARGUMENT

Point I.

The decision of Division 5 of the Interstate Commerce Commission in Cause No. MC-F-3487, approving transfers of petitioners' operating rights to various pur-

chasers, did not amount to a recognition or authorization of the original loan so as to validate that loan within the meaning of the Federal statutes and thus validate the judgment.

Point II.

The note and mortgages were void, and being void, the judgment on the note and foreclosing the mortgages was likewise void, and the Court of Appeals erred in affirming, if it did, the trial court's decision that the invalidity could not be raised after judgment.

Point III.

The Court of Appeals erred in affirming, if it did, the trial court's judgment that the motion to vacate the judgment under Rule 60 (b) of the Federal Rules of Civil Procedure was not filed within a reasonable time.

ARGUMENT

Point I.

The decision of Division 5 of the Interstate Commerce Commission in Cause No. MC-F-3487, approving transfers of Petitioners' Operating Rights to various purchasers, did not amount to a recognition or authorization of the original loan so as to validate that loan within the meaning of the Federal Statutes and thus validate the judgment.

We wish to emphasize as a predicate to argument that there is no attempt to circumvent or deprive respondent of whatever rights it had or may have under the provisions of Paragraph 11 of Section 20 (a), or to escape

liability for the consideration advanced upon the loan. The attempt is rather to relegate respondent to its rights under the statute, and to correct the void and erroneous judgment vesting respondent with a superior mortgage lien upon all properties and assets of petitioners, superior to all of the claims and demands of other creditors, which lien, if it was in fact enforced under a valid foreclosure sale, deprived petitioners of valuable properties sufficient to retire all of their other indebtedness with ample equity remaining.

The Court of Appeals apparently concedes that the note and mortgages were void, or assumed so, but holds that an action of the Interstate Commerce Commission subsequent to the rendition of judgment was sufficient recognition of the prior unapproved note and mortgages to cure any defects. In this we say the court erred.

The *Nickel Plate* case (*New York, Chicago & St. Louis Railroad Company* v. *Frank*, 314 U. S. 360, 86 L. Ed. 277), cited and relied upon, concerns a wholly different situation than that involved here, which is readily apparent from that opinion. There is present here no refusal of the Interstate Commerce Commission to assume jurisdiction or to consider this loan when originally made, nor is there present any evidence of a long course of dealing in matters affecting petitioners, which involved this loan in any way, sufficient to create any recognition or knowledge on the part of the Commission. Indeed, there is nothing in this record to indicate that the Interstate Commerce Commission was ever aware of the note and mortgages, and when it became aware of their existence, no affirmative action of approval or ratification occurred. Further, the Com-

mission declined to consider the question, holding that the validity of the judgment and of the note and mortgages upon which it was based was a question for the Federal Court. We respectfully submit that the *Nickel Plate* case is not applicable or controlling, and that the Court of Appeals erred in applying it.

The Commission has held on several occasions relative to motor carriers that the execution of a note and mortgage, without the approval of the Commission, renders the obligation void and that there is no means provided for validating such obligation. John M. Castle, Incorporated, Issuance of Notes, 5 M. C. C. 541; Consolidated Freightways, Inc., Issuance of Notes, 22 M. C. C. 316; Washington Motor Coach Co., Inc., 5 M. C. C. 519.

This being so, it is not apparent how any action of the Commission in a proceeding of a totally different type could be held to have been intended as a recognition or ratification of the void note and mortgages so as to validate the judgment. Furthermore, the Commission specifically declined to pass upon the validity of the note and mortgages and the judgment. In its decision on the transfer of permits, the Commission said (R. 27-28):

> "Motor Freight and the partnership moved to dismiss each of the considered applications in which the R. F. C. has joined as a party applicant, on the ground that the latter is not a carrier within the meaning of section 5 of the act; that it has no title to the operating rights and property which it proposes to sell to the several vendees; and that, consequently, the applications do not present transactions within the scope of section 5. They allege that the foreclosure proceedings are void for the reason that the note sued on

was issued without authorization therefor having first been obtained from this Commission, as required under the provisions of section 214; and that by virtue of the judicial sale and pursuant thereto, the R. F. C. did not acquire any title to the operating rights and property and could convey none to the several vendees. The several vendees were advised of the intention of Motor Freight to assert its title to the operating rights and property in the event it is successful in any of the pending appeals. * * * . Even if it be conceded that the note sued on was void, *the foregoing matters, to the extent that they constitute a collateral attack upon the judgments rendered by the court and the judicial sale pursuant thereto, are obviously improper here*" (Emphasis ours).

Additionally, we submit that the action of the Interstate Commerce Commission on these transfers, being some two years subsequent to the rendition of the judgment, could not as a matter of law operate to validate the unapproved note and mortgages so as to render the judgment valid.

—49 Corpus Juris Secundum, Sec. 451;

City Loan System, Inc., v. *Nordquist*, 165 Atl. 341;

Easterline v. *Bean*, 49 S. W. (2d) 427;

Le Clair v. *Calls Him*, 233 Pac. 1087.

Petitioners respectfully submit that the Court of Appeals erred in applying the rule announced in the *Nickel Plate* case; that it has erroneously decided an important question of Federal law in the construction it has placed upon Sections 314 and 20 (a), Title 49 USCA, and that this Court should take jurisdiction herein to correct such error.

Point II.

The note and mortgages were void, and being void, the judgment on the note and foreclosing the mortgages was likewise void, and the Court of Appeals erred in affirming, if it did, the trial court's decision that the invalidity could not be raised after judgment.

—*Dial* v. *Kirkpatrick*, 168 Okla. 21, 31 Pac. (2d) 591;

People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Company v. *Burke* (Colo.), 212 Pac. 837, 30 A. L. R. 1085;

Neal v. *Travelers Insurance Company*, 188 Okla. 131, 106 Pac. (2d) 811;

City of Norman v. *Van Camp*, 87 Okla. 182, 209 Pac. 925;

Schley v. *Andrews* (N. Y.), 121 N. E. 812;

Whitehead v. *Bunch*, 134 Okla. 63, 272 Pac. 878;

Glover v. *Warner*, 135 Okla. 177, 274 Pac. 177;

Grant v. *Ellis* (Comm. of Appeals, Texas), 50 S. W. (2d) 1093;

Harrison v. *Barngrover* (Tex.), 72 S. W. (2d) 971 (Certiorari denied 294 U. S. 731, 79 L. Ed. 1260);

Fishel v. *Kite*, 101 Fed. (2d) 685;

Mason v. *Duncanson*, 166 U. S. 533, 41 L. Ed. 1105;

United States ex rel. Wilson, Adm'r, v. *Walker*, 109 U. S. 260, 27 L. Ed. 927.

The indebtedness of petitioners, the partnership, at the time of the execution of the note and mortgages is not

seriously disputed, and there is no dispute but that the principal amount of the note was $560,000.00. Respondent does not seriously question but that this note and the mortgages required approval of the Interstate Commerce Commission.

Section 20 (a), which is made applicable to motor carriers by Section 314, Title 49 USCA, clearly makes it unlawful by Paragraph 2 thereof for a motor carrier to issue any evidence of indebtedness in excess of $500,000.00 until appropriate application has first been filed with the Commission, giving the Commission an opportunity to investigate the circumstances and the lawfulness and objects of the indebtedness. Paragraph 7 vests the Commission with exclusive jurisdiction of these matters, and Paragraph 11 specifically provides that any such obligation shall be absolutely void if the requirements of Paragraph 2 are not met.

Since the note and mortgages here were issued in positive violation of the statute, we submit that they were void; and the judgment based thereon was likewise void, and the question of its invalidity could be raised at any time. *Dial* v. *Kirkpatrick, supra; People* v. *Burke, supra.*

Paragraph 11 of Section 20 (a) gave to the respondent here two remedies, depending upon the circumstances under which it acquired the note and mortgages, but neither of these remedies includes a foreclosure of the note and mortgages securing it as though valid and decreeing the mortgage as a superior lien upon the property and assets covered thereby. The trial court held and the Court of Appeals apparently affirmed a judgment con-

trary to that permitted by Paragraph 11, and we submit that this was error. *Whitehead* v. *Bunch, supra; Neal* v. *Travelers Insurance Company, supra; Mason* v. *Duncanson, supra; Harrison* v. *Barngrover, supra.*

Petitioners respectfully submit that the note and mortgages being void, the judgment was likewise void, and the trial court erred in holding and the Court of Appeals in affirming, if it did, the judgment and decision that the invalidity could not be raised. We believe that in this action the Court of Appeals has sanctioned a departure from well-recognized and settled principles of law, sufficient to warrant this Court in assuming jurisdiction.

Point III.

The Court of Appeals erred in affirming, if it did, the trial court's judgment that the motion to vacate the judgment under Rule 60 (B) of the Federal Rules of Civil Procedure was not filed within a reasonable time.

The motion for relief from judgment or to vacate the judgment was filed approximately twenty-six months after its rendition. From April 15, 1946, until May of 1947, petitioners were in possession of the properties and carrying on the operations. Petitioners did not become aware of the statutory prohibition until February of 1948. The motion to vacate was filed shortly thereafter.

Rule 60 (b) specifically provides for a motion to vacate a judgment, where it is void. The time for filing the motion to vacate for certain grounds is limited to one year, but under the rule itself there is no limitation upon the time where the judgment is void.

The purpose of the rule is to provide a speedy and adequate means of relief to parties from a judgment without the necessity of an independent action. There appears to be no definite or ironclad rule concerning the time within which such motions should be filed. The Oklahoma statute (12 O. S. A., 1038) as well as the great weight of authoritative decisions permits an attack upon a void judgment at any time. While this may not be controlling as applied to Rule 60 (b), we believe and submit that it should have considerable bearing upon what should be determined to be a reasonable time.

We respectfully submit that, under all the facts and circumstances in this case as disclosed by the record, particularly where petitioners were in possession of their properties for a great deal of the time subsequent to the judgment, the trial court should have considered the motion as filed within a reasonable time; and we further submit that the action of the Court of Appeals in affirming, if it did, the trial court's decision that the motion was not filed within a reasonable time, was erroneous. Since such decision involves an interpretation of Rule 60 (b), which we do not believe has been directly determined by this Court, jurisdiction should be taken to settle this.

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May, 1949.

INDEX

CITATIONS

Cases:

Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 767 and 768

BREEDING MOTOR FREIGHT LINES, INC., DEBTOR,

and

BREEDING MOTOR COACHES, INC., DEBTOR, PETITIONERS,

v.

RECONSTRUCTION FINANCE CORPORATION

Nos. 769 and 770

GLENN E. BREEDING AND IRENE BREEDING, DOING BUSINESS AS BREEDING MOTOR COACHES AND BREEDING MOTOR FREIGHT LINES, BREEDING MOTOR FREIGHT LINES, INC., AND BREEDING MOTOR COACHES, INC., PETITIONERS

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the Eastern District of Oklahoma in Nos. 767 and 768 (767 R.

389-390),[1] its order in No. 769 (767 R. 274-278) and its finding of fact and order in No. 770 (770 R. 85-89) were entered without opinions. The opinion of the Court of Appeals for the Tenth Circuit (767 R. 871-885; 770 R. 109-123) is reported at 172 F. 2d 416.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1949 (767 R. 886; 770 R. 124). The petitions for writs of certiorari were filed on May 6, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the reorganization petitions were properly dismissed as lacking good faith within the meaning of Chapter X of the Bankruptcy Act.

(2) Whether the foreclosure sale, made pursuant to 28 U. S. C. 2001(a), should be set aside for alleged irregularities.

(3) Whether the foreclosure judgment, on which the sale was based, should be vacated because the mortgage agreement was not approved in advance by the Interstate Commerce Commission as required by Section 20(a) of the Interstate Commerce Commission Act (41 Stat. 494).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 14-16.

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[1] There are two records involved in these four connected cases; the record in Nos. 767-768-769 is referred to as 767 R.; the record in No. 770 is referred to as 770 R.

STATEMENT

These four cases arise out of the insolvency of Glenn E. and Irene Breeding, doing business as common carriers by motor under the names of Breeding Motor Freight Lines and Breeding Motor Coaches, and of their two wholly-owned corporations, successors to their partnership business, Breeding Motor Freight Lines, Inc., and Breeding Motor Coaches, Inc. All of these parties are referred to as petitioners, except where otherwise stated, since the activities on behalf of all of them were carried on by Glenn E. Breeding.

Respondent had agreed in November 1945 to lend petitioners $560,000, repayable in monthly installments of $9,334.00. Respondent had advanced over half of the loan, but petitioners defaulted on the second installment, due January 9, 1946. The first legal proceedings in this case were instituted on February 1, 1946, when the respondent filed suit in the district court for judgment upon petitioners' promissory note and for foreclosure of real and chattel mortgages securing the note [2] (767 R. 1-5). Petitioners filed an answer and counterclaim to the foreclosure action alleging

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[2] The petitioner corporations were organized at the time of the loans, but since Interstate Commerce Commission's approval of the transfers of operating rights from the partnership to them was necessary, the transfers were not completed until July, 1946 (767 R. 499). The corporations were subsequently made parties to the foreclosure action (767 R. 192-193). Two junior mortgagees were named as parties defendant, and the United States and the State of Oklahoma intervened for tax claims (767 R. 193-197).

that the respondent should have made a second advance to them before their second installment on the debt was due (767 R. 51-53). However, at the hearing on April 15, 1946, the attorneys for petitioner and respondent agreed that petitioners would drop their claim and confess judgment for the principal amount due; that the receiver appointed on the filing of the suit was to be discharged; and that Mr. Breeding was to have possession of the business for 60 days during which time he would try to salvage it, but if he could not do so, then the mortgaged property was to be sold by a Special Master to be appointed by the district court (767 R. 101-102). Judgment for respondent and the other mortgagees, including a decree of foreclosure sale on these terms, was entered the same day (767 R. 154-162).

Petitioner stayed in possession until May 2, 1947, when a Special Master was appointed to sell the property (767 R. 198). On May 29, 1947, Breeding Motor Freight Lines, Inc., filed a petition in the district court for a stay of the foreclosure proceedings and for a reorganization under Chapter X of the Bankruptcy Act (767 R. 321-340). Two days later, on May 31, a similar petition was filed on behalf of Breeding Motor Coaches, Inc. (767 R. 395-406). The two petitions were consolidated and after a hearing (767 R. 464-613) were dismissed by the district court on June 10, 1947, on the finding that the petitions had not been

filed in good faith as required by Chapter X of the Bankruptcy Act (767 R. 389-390).

Proceedings on the foreclosure sale were brought to a conclusion. On June 27, 1947, the Special Master secured a new execution and order of sale to take into account changes since April 15, 1946 (767 R. 199, 203-206); petitioners' objections to the Special Master's notice of sale (767 R. 207-218) were overruled on August 11, 1947 (767 R. 219); the sale, by public auction, was held on August 18, 1947; and the next day the Special Master filed his return together with a transcript of the sale proceedings, showing that all the property was purchased by respondent (767 R. 219-261). Petitioners objected to confirmation of the sale (767 R. 262-272), and after a hearing (767 R. 280-303) the district court confirmed the sale on September 8, 1947 (767 R. 274).

The property included certain operating rights granted by the Interstate Commerce Commission which respondent resold to other carriers. The purchasers of these operating rights applied for the necessary approval, and on May 28, 1948, the Interstate Commerce Commission approved the transfers of the rights from the Special Master to the purchasers (770 R. 18-62). Petitioners appeared in these proceedings before the Interstate Commerce Commission and objected on the ground that their foreclosed securities had not been approved by the Commission. The Commission held

that this was a collateral attack on a final judicial sale which it would not consider (770 R. 28).

On June 14, 1948, over two years after the original judgment, petitioners filed a motion in the district court to vacate the judgment and to set aside the foreclosure sale on the ground that the note and mortgages involved were void for lack of approval by the Interstate Commerce Commission (770 R. 15-16). Upon both a hearing (770 R. 91-105) and stipulated facts (770 R. 76-84), the district court on August 21, 1948, entered its findings of fact, conclusions of law, and order dismissing the motion to vacate the foreclosure judgment (770 R. 85-89). The district court held that petitioners were inexcusably late in making this defense to the foreclosure and that the equities were against them (770 R. 87).

All these proceedings in the district court were heard and decided by District Judge Rice. Petitioners appealed from the decisions of the district court dismissing the reorganization petitions, confirming the foreclosure sale, and dismissing the motion to vacate. The Court of Appeals for the Tenth Circuit upheld each of these decisions (767 R. 886-887; 770 R. 124).[3] The dismissal of

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[3] Respondent appealed from the findings of the district court that the loan to petitioner was in excess of $500,000 and thus subject to Interstate Commerce Commission's approval (770 R. 86). That appeal was denied by the Court of Appeals on the ground that the finding was not an appealable final order or judgment (767 R. 885; 770 R. 123). That issue is not before this Court.

the reorganization petitions is involved in Nos. 767 and 768; the confirmation of the foreclosure sale is involved in No. 769; and the motion to vacate the foreclosure judgment is involved in No. 770.

ARGUMENT

(1) As both courts below found, petitioners' motor freight and passenger business, at the time of the filing of petitions for reorganization under Chapter X of the Bankruptcy Act, was hopelessly insolvent, and there was no reasonable possibility of successful operations. Petitioners had acquired the business in 1944. They suffered substantial losses from its inception. Throughout the history of the venture, their constant plan to save the business was to sell some routes, property and equipment, and, with the further help of loans, to purchase new equipment (767 Pet. 24). But, except for two items, they never could sell the surplus properties, or meet existing debts or overcome mounting operating losses (767 R. 576-579). By May, 1947, any salvage plan had become impossible of realization.

Operating losses were excessive.[4] The judgment secured by mortgage to respondent and the

[4] The net operating loss for 1946 for the Motor Coaches was $77,578 on a gross revenue of $89,173; and for the first four months of 1947 the loss was $30,821.57 on a gross revenue of $14,915.97. The net operating loss upon the Freight Lines for 1946 was $189,410 on a gross revenue of $408,297.00; and for the first four months of 1947 the net operating loss was $44,533 on a gross revenue of $153,123.53 (767 R. 866-869). Thus, the average monthly loss for both operations in 1947

other mortgagees totaled $421,547.52, exclusive of interest, and attorneys' fees.[5] There were other lien claims. Petitioners had used for operating expenses $20,000 of C.O.D. collections (767 R. 578); $100,000 of various federal taxes collected from the source (767 R. 195);[6] and nearly $2,000 of Oklahoma sales taxes collected on fares. In addition, $10,000 was due the state for mileage taxes. Both federal and state tax liens had been filed. (767 R. 193-196.) Petitioners owed $10,000 on inter-line accounts (767 R. 577). In addition to the judgment debt, they owed respondent another $21,250 for advances made to cover operating expenses (767 R. 578). There was a debt of $52,000 to unsecured creditors, and the individual petitioners personally owed $67,000 on partnership notes (767 R. 579). The business had been shut down for lack of cash to pay wages (767 R. 522), some of the state operating rights had been cancelled, and proceedings were pending before the Interstate Commerce Commission to cancel rights issued by it (767 R. 591). Petitioners had no cash (767 R. 578).

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before interest and depreciation, was $18,838 on a gross monthly income of only $42,000.

[5] This sum includes $253,577.52 due to respondent on the original note (767 R. 155), plus $42,250 advanced during 1946 and added to the judgment (767 R. 191); $77,720 due to one mortgagee and $48,000 due to the other (767 R. 157).

[6] Petitioners say that these tax claims were being compromised (Pet. 767, p. 24), but the only evidence is that Mr. Breeding had made an offer on which the federal tax authorities had not acted (767 R. 598).

To meet this picture, petitioners rely upon a valuation by Mr. Breeding of the property, item by item (Pet. 767, p. 23-24). This valuation (767 R. 645-654) is irrelevant for reorganization purposes, since the business was not a profitable one. *Consolidated Rock Co.* v. *Du Bois,* 312 U. S. 510, 525-526. To put it on a profitable basis, Mr. Breeding acknowledged that he would need a new loan of $360,000 (767 R. 597). To secure these funds, petitioners had some vague plans for selling some portions of the properties and for issuing receiver certificates (767 R. 602-605). At the time of the hearing, petitioners were asking respondent for working cash (767 R. 601).

In the face of these facts, the action of the district court dismissing the petitions for reorganization was not only within its discretion (*Tennessee Publishing Co.* v. *American National Bank,* 299 U. S. 18; *Manati Sugar Co.* v. *Mock,* 75 F. 2d 284 (C. A. 2); *Brockett* v. *Winkle Terra Cotta Co.,* 81 F. 2d 949 (C.A. 8); *Chapman Bros. Co.* v. *Security-First National Bank of Los Angeles,* 111 F. 2d 86 (C.A. 9); *San Francisco Laundry Ass'n* v. *American Trust Co.,* 127 F. 2d 187 (C.A. 9)); retention of these reorganization proceedings would have been an error on the part of the district court. *Fidelity Assurance Ass'n* v. *Sims,* 318 U. S. 608; *Provident Mut. Life Ins. Co. of Philadelphia* v. *University Evangelical Lutheran Church of Seattle,* 90 F. 2d

992 (C. A. 9); *First Nat. Bank of Wellston* v. *Conway Road Estates Co.*, 94 F. 2d 736 (C. A. 8), certiorari denied, 304 U. S. 578; *Price* v. *Spokane Silver & Lead Co.*, 97 F. 2d 237 (C. A. 8); *In re Suburban Properties, Inc.*, 110 F. 2d 438 (C. A. 7); *In re Sheridan View Bldg. Corporation*, 149 F. 2d 532 (C. A. 7). No feasible plan, which the secured creditors could have been forced to accept, was possible. Cf. *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 109.[7]

2. The objections to the foreclosure sale presented to this Court in No. 769 are groundless. The sale was conducted in substantial accord with the order of sale and pursuant to 28 U. S. C. 2001(a) (767 R. 275-276); it was attended by at least seven of the reputable motor carriers in the area (767 R. 300), and there was spirited bidding on each parcel of property (767 R. 241-261). Petitioners' objections go to technical, minute details; they do not show that any bidders were misled or that any higher bids for the property could have been obtained from any source. Petitioners argue, first, that there is a shocking discrepancy between the sale price of $145,000 and the petitioners' own valuation of $913,000, which, taken with alleged irregularities, proves that prejudicial errors were com-

[7] Since the plan was not feasible, the creditors' objections thereto are in good faith. Section 203 of Chapter X of the Bankruptcy Act, authorizing the disregard of objections not in good faith, consequently does not apply, and *Young* v. *Higbee Co.*, 324 U. S. 204, which involved such objections, cited by petitioners (Pet. No. 767, p. 25), is irrelevant.

mitted (767 Pet., pp. 33-34). But there is no shocking discrepancy, because petitioners' valuation is too high, and the price received is not low. Petitioners' valuation of an insolvent business as if it were a going concern is no measure of its value, *Consolidated Rock Co.* v. *Du Bois, supra,* p. 9, and the price which property commands at a forced sale "may be hardly even a rough measure of its value." *Gelfert* v. *National City Bank,* 313 U. S. 221, 233. Petitioners' expert witness in the reorganization petition hearings testified that at a public sale the property could not be expected to bring in more than 25% of its value (767 R. 491).

Petitioners argue, alternatively, that no affirmative showing of prejudice is required to set aside a sale for irregularities (767 Pet. 35). But the rule is clear that the irregularities must themselves be of such a nature as to be prejudicial to a fair sale, or else an affirmative showing of prejudice must be made. *Pewabic Mining Company* v. *Mason,* 145 U. S. 349. The cases cited by petitioner do not support its argument. In the *Pewabic Mining Co.* case, the court refused, in the absence of an affirmative showing of prejudice, to set aside a sale for trifling errors. See also *Stockmeyer* v. *Tobin,* 139 U. S. 176, 196. In *Schroeder* v. *Young,* 161 U. S. 334, there was fraud. In *Ballentyne* v. *Smith,* 205 U. S. 285, 291, both the commissioner who made the sale and the district court, familiar with local conditions, refused to confirm the sale, because the price

was so grossly inadequate. In *Gelfert* v. *National City Bank, supra,* there was a statute fixing a minimum upset price.

Petitioners cite *Bovay* v. *Townsend,* 78 F. 2d 343 (C. A. 8), as being in conflict with the decision below on the point of prejudice (767 Pet., p. 35). But in that case, the fact of an unfair sale was, in the court's judgment, inherent in the method of sale. Bridges located in two different places, serving two different communities, should have been sold separately. That case obviously rested on its peculiar facts and is no authority for the proposition asserted here, that, as a matter of law, the bulk sale of the operating equipment of a single enterprise, including miscellaneous items of office furniture, is bound to bring a substantially lower price than a sale of each item separately. This is an unsupportable contention. *Reconstruction Finance Corp.* v. *Kentucky River Coal Corp.,* 114 F. 2d 942 (C. A. 6).

3. The motion to vacate the foreclosure judgment presents no reviewable issue to this Court. The statutes, *infra,* pp. 15-16, requiring approval by the Interstate Commerce Commission of the issuance of securities by a carrier subject to its regulation were enacted to prevent financial manipulation by those in control of the carrier. *New York, Chicago & St. Louis R. R. Co.* v. *Frank,* 314 U. S. 360. The validity of the securities cannot be questioned collaterally and late, at the instance of petitioners who benefited from the original transaction,

to upset a final orderly liquidation of an insolvent enterprise. *New York, Chicago & St. Louis R. R. Co.* v. *Frank, supra; Guaranty Trust Co. of N. Y.* v. *Minneapolis & St. Louis R. R. Co.*, 36 F. 2d 747 (C. A. 8); *Marony* v. *Wheeling & L. E. Ry. Co.*, 33 F. 2d 916 (S. D. N. Y.).

CONCLUSION

The decisions below rest upon the peculiar facts of the case and are correct. No important questions of law and no conflict of decisions are involved. We respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1949

APPENDIX

I

Chapter X of the Bankruptcy Act, 52 Stat. 883, 887, 11 U.S.C. 541, 546, provides in relevant part as follows:

> ARTICLE VI—APPROVAL OR DISMISSAL OF PETITION
>
> SEC. 141. Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied.
>
> SEC. 146. Without limiting the generality of the meaning of the term "good faith", a petition shall be deemed not to be filed in good faith if—
>
> * * * * *
>
> (3) it is unreasonable to expect that a plan of reorganization can be effected;
>
> * * * * *

II

28 U.S.C. Sec. 2001(a) provides in relevant part as follows:

> § 2001. Sale of realty generally
>
> (a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof lo-

cated therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

* * * * *

III

Interstate Commerce Act, 41 Stat. 456, 494 (49 U. S. C. 20(a)) provides in relevant part as follows:

SEC. 20a. * * *

(2) * * * it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') * * * unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, * * * the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * *

(11) Any security issued or any obligation or liability assumed by a carrier, for which

under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, * * *. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment in the discretion of the court.

* * * * *

IV

Motor Carrier Act, as amended, 52 Stat. 1240 (49 U.S.C. 314) provides in relevant part as follows:

> SEC. 214. Common or contract carriers by motor vehicle * * * shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20(a) of part I of this Act * * *.

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